IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PEITION NO.1804 OF 2006

TCE Consulting Engineers Ltd.
(Formerly known as Tata Consulting
Engineers a Division of Tata Sons Ltd.). ...Petitioner.

Versus

Mr. Dilip P.Pandit & Anr. ...Respondents.

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Mr. K.M. Naik with Mr. S.P. Salkar for the Petitioner.
Mr. R. D. Bhat for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD, J.

August 14, 2006.

ORAL JUDGMENT:

Rule, by consent of Counsel returnable forthwith. Counsel appearing on behalf of the Respondents waives service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The First Respondent was engaged as Senior Clerk/typist with the Petitioner. On 24th May 1994, an incident took place which led to the institution of criminal proceedings against the First

Respondent. At about 8.50 a.m. on that day, Shri S. M. Shetty who was Deputy Manager in charge of Administration and Personnel was carrying out his usual rounds of various Departments when he noticed the First Respondent coming out of the cabin of S.J. Belsare, Chief Mechanical Engineer on the third floor of the Mechanical Department at the Carnac Office. Mr. Belsare was absent at that time and hence, it is alleged that the Deputy Manager enquired as to why he was present in Mr.Belsare's cabin. To this, the First Respondent replied that he was using the telephone of the Chief Mechanical Engineer (CME) for making an urgent personal call. The Deputy Manager brought to the notice of the First Respondent that entering the Cabin of the CME without permission and in his absence for making a personal telephone call was not permissible. The First Respondent, it is alleged, rudely answered, stating that he could use the telephone whenever required and there was no rule. Thereafter, the Deputy Manager, Shetty, reported the incident to Shri A. Ramadas, Assistant Chief Mechanical Engineer. The First Respondent followed the Deputy Manager into the Cabin of Shri Ramadas and was alleged to have shouted at him by saying the he

was “lying and bluffing”. Then, it is alleged that the First Respondent threatened Mr.Shetty, the Deputy Manager, by stating that he would “see you outside the office” and continued shouting for sometime.

3. On these allegations a disciplinary enquiry was convened and a charge sheet was issued on 3rd June 1994. Evidence was adduced in the course of departmental proceedings. The Enquiry Officer in his report dated 23rd September 1996 came to the conclusion that in so far as the first part of the incident was concerned, though it is illegal for any employee to enter the cabin of a superior in order to make a personal call without permission, there was justification on the part of the First Respondent in doing so since his mother had taken ill the previous night and the purpose of the phone call was to enquire about her condition. However, the Enquiry Officer came to the conclusion that the second part of the incident which took place in the Cabin of Mr. A.Ramadas, ACME established a case of misconduct that would amount to riotous, disorderly, and indecent behaviour on the premises of the establishment under Standing Order 24(j) or the commission of any act subversive of

discipline or good behaviour on the premises of the establishment under Standing Order 24(k). The Enquiry Officer relied upon the evidence of Mr.S. M. Shetty who was an eye witness and who had allegedly been threatened by the First Respondent in the Cabin of Mr.A. Ramadas, ACME. The evidence of Mr. Shetty was to the following effect:

> "Mr. S.M. Shetty, MW1 in his chief examination in reply to question No.10 has stated as under :
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> "Thereafter around 9.30 a.m. I wanted to report this matter to the Mechanical Departmental Head. I went to the room of Mr. A.Ramdas, Additional Mechanical Chief Engineer, who acts as departmental head of the mechanical department in the absence of Mechanical Chief Engineer Mr. S.J. Belsare. The moment I entered and started speaking to Mr. Ramdas, Mr. Pandit followed me to the room of Mr. Ramdas and started shouting by saying he is "lying and bluffing" at this Mr. Ramdas told Mr. Pandit that he should not have entered the room without his permission and should not create scene and was asked to leave the room which Mr. Pandit refused to go and threatened by saying, "I will see you out side the office". He went on shouting for sometime."

The Enquiry Officer was of the view that the evidence of Mr. Santhanam, Engineering Manager who was also examined by the management as a second witness supported the case of the

management. Though Santhanam personally was not an eye witness, the Deputy Manager Mr. Shetty had narrated the incident which had taken place to him. In sum and substance, the Enquiry Officer held that the conduct of the First Respondent in administering the threat to the Deputy Manager who had pointed out his behaviour to a superior was unlawful and amounted to a misconduct under Standing Orders 24(j) and 24(k).

4. The management moved an application for approval under Section 33(2)(b) of the Industrial Disputes Act, 1947. A Charter of Demands had been made by the Tata Consulting Employees' Union which had culminated into Reference (IT) No.49 of 1986 which was pending. The Industrial Tribunal by its order dated 28th February 2006 declined to grant its approval. Three issues were framed by the Industrial Tribunal, the first being whether the enquiry that was conducted was in accordance with the rules or Standing Orders or principles of natural justice; the second was whether the management has made out a prima facie case for dismissal based on legal evidence adduced; and the third was whether the management

had come to the bona fide conclusion that the workman was guilty and the dismissal did not amount to an unfair labour practice and/or victimization. The Industrial Tribunal has answered the first and second issues in the negative holding that the enquiry was fair and proper and that a prima facie case for dismissal had been made out based on legal evidence adduced during the enquiry. However, it is the third issue which is answered against the management since the Industrial Tribunal came to the conclusion that the imposition of a penalty of dismissal from service was shockingly disproportionate.

5. Counsel appearing on behalf of the Petitioner has submitted before the Court that the Industrial Tribunal has proceeded on the basis that the punishment of dismissal that was imposed was for a misconduct of unauthorisedly making a telephone call from the Chambers of a superior officer. Counsel stated that the enquiry report would show that in so far as the charge of making a telephone call unauthorisedly was concerned, the report in fact concludes by stating that though the First Respondent could not have made such a telephone call without permission and during the absence of the

superior officer from his Chamber, there was justification on the part of the First Respondent in doing so in view of the fact that he was trying to enquire after his mother's health. However, the submission is that the serious aspect of misconduct that emerged was that when the First Respondent was questioned by the Deputy Manager and thereafter the incident came to be reported to A. Ramadas, ACME, the First Respondent threatened him by shouting at him in the Cabin and stated that he would 'see' him outside meaning thereby that he would tackle him outside. Counsel submitted that the Tribunal has completely ignored this part of the evidence on the finding of misconduct. On the other hand, Counsel appearing on behalf of the First Respondent submitted that it was within the jurisdiction of the Tribunal while considering the application under Section 33(2)(b) to determine as to whether the punishment that is sought to be imposed is disproportionate. Hence, it was submitted that the Tribunal was acting within its jurisdiction in declining to grant relief as the punishment was shockingly disproportionate. Moreover, Counsel submitted that it was unlikely that the workman would threaten another officer in the presence of a superior as is the allegation in the

present case.

6. The Tribunal has refused to grant its approval on the application under Section 33(2)(b) in the present case. The charge of misconduct which has been held to be proved at the disciplinary enquiry is under Standing Orders 24(j) and 24(k). More specifically, it emerged in the course of the enquiry that the Deputy Manager, Shri S.M. Shetty, had during the course of his rounds of the establishment detected that the First Respondent was using the Chamber of the Chief Mechanical Engineer of the Company, Shri S.J. Belsare, in his absence. The First Respondent was asked as to why he had entered the Chamber of the Officer in his absence. It is alleged that the First Respondent rudely informed Shri Shetty that he could use the phone at any time without permission and that he should be shown the rule prohibiting him from making a phone call. The matter, however, did not end there. After Shetty reported the incident to Shri A. Ramadas, who was the Additional Chief Mechanical Engineer, the First Respondent, as Shetty's evidence would show, followed him into

the Cabin of Mr. A. Ramadas and started shouting by alleging that Shetty was “lying and bluffing”. It is alleged then that after Shri Ramadas told the First Respondent that he should not have entered the Chambers without permission and that he should leave, he refused to leave the room and threatened Shri Shetty that he would see him outside. Shetty alleged that he continued to shout for sometime. The Tribunal did not find that there was any breach of the principles of natural justice in the disciplinary enquiry. In fact, the finding was that the enquiry was held consistent with the principles of natural justice and that the finding of misconduct was based on legal evidence. Despite this, the Tribunal declined to grant approval on the supposition that the punishment of dismissal was for an incident of a trivial nature. Now, a reading of the order of the Tribunal would show that *ex-facie* the Tribunal has completely lost sight of the nature of the incident. The misconduct that emanated from the incident was that the First Respondent had threatened a superior who was complaining about his conduct. The administration of a threat and the use of intimidatory language cannot but be regarded as an act of misconduct. At this stage, the Tribunal was required to prima facie

evaluate the merits of the case for the purpose of the application under Section 33(2)(b). There is merit in the submission which has been urged on behalf of the Petitioner that the Tribunal has misdirected itself by misconstruing the nature of the charge of misconduct; by ignoring a material part of the oral evidence on the record and the finding that has been arrived at by the enquiring officer. Undoubtedly as submitted on behalf of the First Respondent, it is open to the Tribunal while considering an application under Section 33(2)(b) to determine as to whether the punishment imposed is shockingly disproportionate. For the purposes of evaluating an application under Section 33(2)(b), it cannot be said that having regard to the nature of the misconduct held to be proved, that the punishment is shockingly disproportionate. In recent judgments, the Supreme Court has held that use of improper language on the part of a workman is an act of misconduct and the imposition of a penalty of dismissal for verbal abuse cannot be regarded as shockingly disproportionate. (**Mahindra and Mahindra vs. N. N. Narawade,**[1] and **L.K. Verma vs. H. M. T. Ltd**.[2]) Abusive language in my view,

1 JT 2005 (2) SC 583
2 2006 LLR 296

cannot be only confined to what may be termed as 'fighting words', but it would also incorporate a case where an employee has administered a threat to a superior who is correcting him for conduct in breach of the rules and regulations governing the establishment.

7. The scope of the power of the Industrial Tribunal under Section 33 of the Industrial Disputes Act, 1947, has been considered in several judgments of the Supreme Court. The principles which emerge from the decided cases are as follows:

-(i) Section 33 does not confer jurisdiction upon the Tribunal to adjudicate on a dispute on merits but allows the Tribunal to grant or withhold its permission to the employer to discharge or punish a workman concerned in the industrial dispute;

-(ii) The Industrial Tribunal acts not as a reviewing Tribunal but has to consider whether the employer has made out a prima facie case;

-(iii) The Tribunal while considering whether to grant permission

has to determine as to whether the employer is not acting malafide, is not resorting to an unfair labour practice, intimidation or victimisation and that there is no basic error of contravention of the principles of natural justice ; and

-(iv) The function of the Tribunal in giving or refusing permission is not to adjudicate upon the industrial dispute but to prevent the victimization of workmen for having raised an industrial dispute.

8. The test which was formulated by the Constitution Bench of the Supreme Court in **Patna Electric Supply Co.Ltd. Vs. Shri Bali Rai**,[3] was whether the employer was not guilty of any unfair labour practice or vicitimization and whether the action proposed was in honest exercise of the employer's right.

9. In **G. Mckenzie & Co. Ltd. v. Its Workmen**,[4] the Supreme Court held thus:

> "That Section does not confer any jurisdiction on a Tribunal to adjudicate on a dispute but it merely empowers the

3 AIR 1958 SC 204
4 AIR 1959 SC 389

> Tribunal to give or withhold permission to the employer during the pendency of an industrial dispute to discharge or punish a workman concerned in the industrial dispute. And in deciding whether permission should or should not be given, the Industrial Tribunal is not to act as a reviewing tribunal against the decision of the management but to see that before it lifts the ban against the discharge or punishment of the workmen the employer makes out a prima facie case. The object of the Section is to protect the workmen in pending industrial disputes against intimidation or victimisation. As said above, principles governing the giving of permission in such cases are that the employer is not acting mala fide, is not resorting to any unfair labour practice, intimidation or victimisation and there is no basic error or contravention of the principles of natural justice. Therefore, when the Tribunal gives or refuses permission it is not adjudicating an industrial dispute, its function is to prevent victimisation of a workman for having raised an industrial dispute. The nature and scope of proceedings under S.33 shows that removing or refusing to remove the ban on punishment or dismissal of workmen does not bar the raising of an industrial dispute when as a result of the permission of the Industrial Tribunal the employer dismisses or punishes the workmen."

In **Sasa Musa Sugar Works (P) Ltd. vs. Shobrati Khan**,[5] the Supreme Court while holding that the Appellate Tribunal was in error in declining its permission under Section 33 held thus:

> "It was not open to the Industrial Tribunal when it was asked to give permission to dismiss to substitute some other kind of punishment and give permission for that. The Industrial Tribunal was satisfied that there was misconduct and that finding has been upheld by the Appellate Tribunal. As such if there was evidence that these forty-eight

5 AIR 1959 SC 923

> workmen were guilty of misconduct. the Industrial Tribunal was bound to accord permission asked for."

On the question of punishment, in **Caltex (India) Ltd. vs. E.Fernandes**,[6] the Supreme Court laid down the following principles of law :

> "We have clearly laid down there that the Industrial Tribunal has no jurisdiction while entertaining an application under Section 33 of the Industrial Disputes Act, 1947, to consider whether the punishment sought to be meted out by the employer to the workman is harsh or excessive. The measure of punishment to be so meted out is within the sole discretion of the employer who is to judge for himself what is the punishment commensurate with the offence which has been proved against the workman. The only jurisdiction which the Industrial Tribunal has under Section 33 is to determine whether a prima facie case for the meting out of such punishment has been made out by the employer and the employer is not actuated by any mala fides or unfair labour practice or victimization. Once the Industrial Tribunal came to the conclusion in the present case that the enquiry which was conducted by the appellants was fair and no principles of natural justice had been violated in the conduct of the enquiry and the appellants bona fide came to be conclusion that dismissal was the only punishment which should be meted out by them to the first respondent, the Industrial Tribunal had no power to substitute another punishment to the one which was sought to be meted out by the appellants to the first respondent nor to impose any conditions on the appellant before the requisite permission could be granted to them."

6 AIR 1957 SC 326

Finally, it would be necessary to refer to the judgment of the Supreme Court in **The Lord Krishna Textile Mills vs. Its Workmen**,[7] Mr.Justice P.B. Gajendragadkar (as the Learned Chief Justice then was) formulated the principles which emerge from the decided cases in relation to the power of the Industrial Tribunal under Section 33 thus:

> "In view of the limited nature and extent of the enquiry permissible under Section 33(2)(b) all that the authority can do in dealing with an employer's application is to consider whether a prima facie case for according approval is made out by him or not. If before dismissing an employee the employer has held a proper domestic enquiry and has proceeded to pass the impugned order as a result of the said enquiry, all that the authority can do is to enquire whether the conditions prescribed by S.33(2)(b) and the proviso are satisfied or not. Do the standing orders justify the order of dismissal? Has an enquiry been held as provided by the standing order? Have the wages for the month been paid as required by the proviso?; and, has an application been made as prescribed by the proviso"

The Supreme Court held that the sufficiency or adequacy of evidence was outside the province of the Tribunal while considering an application under Section 33(2)(b) :

> "It is well known that the question about the adequacy of evidence or its sufficiency or satisfactory character can be raised in a court of facts and may fall to be considered by an appellate court which is entitled to consider facts; but

7 AIR 1961 SC 860

> these considerations are irrelevant where the jurisdiction of the court is limited as under S.33(2)(b). It is conceivable that even in holding an enquiry under section33(2)(b) if the authority is satisfied that the finding recorded at the domestic enquiry is perverse in the sense that it is not justified by any legal evidence whatever, only in such a case it may be entitled to consider whether approval should be accorded to the employer or not; but it is essential to bear in mind the difference between a finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient or adequate or satisfactory evidence."

The same principle has been reiterated in **Delhi Cloth & General Mills Co. vs. Ludh Budh Singh**.[8]

10. Having regard to these well settled principles of law, the Tribunal has in my view, completely erred in declining to grant its approval. Once the Tribunal held that an enquiry was conducted in accordance with the principles of natural justice and that the management had made out a prima facie case for dismissal based on the legal evidence adduced, it was not open to the Tribunal to substitute, at this stage, its view of a proper punishment for the punishment which was imposed by the employer. The Tribunal has

8 (1972) 1 SCC 595

not entered any finding to the effect that the conduct of the employer was malafide or that it amounted to victimization or for that matter unfair labour practice. That is not even the case of the workman, nor has any such submission been urged in this Court. In that view of the matter, the Tribunal has clearly transgressed the limitations on its own jurisdiction.

11. The Court has been informed that in the meantime, a reference to adjudication has been made by the appropriate Government on 29th November 1997. It is necessary for this Court to clarify that all the observations which have been contained in the present judgment are confined to the disposal of the application under Section 33(2)(b). The Industrial Tribunal shall enquire into the reference on merits and shall not consider the observations contained in the present judgment as concluding the question of misconduct or for that matter any of the issues that arise for consideration in the reference. It is settled law that even if approval is granted under Section 33(2)(b), it would be open to the workman to seek a reference to adjudication under Section 10.

12. For all these reasons, I am of the view that the Industrial Tribunal was in error in declining to grant its approval under Section 33(2)(b) of the Industrial Disputes Act, 1947. The judgment and order of the Tribunal dated 28th February 2006 is quashed and set aside. Application (IT) No.6 of 1997 in Reference (IT) No.49 of 1986 shall accordingly stand allowed and the approval under Section 33(2)(b)

shall accordingly stand granted. The petition is accordingly allowed. However, there shall be no order as to costs.

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